2002

State of Utah v. John Michael Hasselblad : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20020730-CA
v.	:	
JOHN MICHAEL HASSELBLAD,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTION FOR BURGLARY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ANTHONY B. QUINN, PRESIDING

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for burglary, a second degree felony. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2002).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

I. Where defendant did not propose his lesser-included offense instruction until two court-imposed deadlines had passed and the trial court had already compiled its instructions, did the court abuse its discretion in rejecting the instruction as untimely?

A trial court's decision to refuse a jury instruction as untimely is reviewed for abuse of discretion. *State v. Evans*, 668 P.2d 566, 568 (Utah 1983).

II. **Did the trial court properly reject defendant's lesser-included offense instruction where defendant's own testimony, if believed, would acquit him on possession of stolen property?**

"'[T]he refusal to give a requested jury instruction on a claimed lesser included offense is a legal determination, which [this Court] review[s] for correctness.'" *State v. Payne*, 964 P.2d 327, 332 (Utah App. 1998) (citation omitted).

III. **Was defendant entitled to his lesser-included offense instruction on possession of stolen property where the instruction contained two elements not required by statute and thus did not accurately state the applicable law?**

Because the trial court did not reach this issue, no standard of review applies.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes and rules, relevant to this appeal, are reproduced in Addenda A and B respectively:

Utah R. Crim. P. 19 (2001);
Utah Code Ann. § 76-6-408 (1999).

STATEMENT OF THE CASE

Defendant was charged with burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1999). At trial, defendant requested an instruction on possession of stolen property as a lesser-included offense (R. 249:91-92). After the trial court denied defendant's request, defendant was convicted as charged (R. 167; R. 249:94-95). The trial court suspended defendant's statutory prison term and ordered defendant to serve 365 days in jail and 36 months on probation (R. 185). The trial court subsequently denied defendant's motion for new trial (R. 228). Defendant timely appealed (R. 229).

STATEMENT OF THE FACTS

At about 3:30 p.m. on August 14, 2000, Candida Rodriguez was in her yard when she saw a group of teenagers walking slowly up and down the street, looking around (R. 249:10, 11, 13, 14). Ms. Rodriguez noticed one girl in the group in particular, who was wearing a red blouse and black skirt (R. 249:12).

A few minutes later, Ms. Rodriguez left her home in her car (R. 249:13). When she returned about fifteen minutes later, Ms. Rodriguez was met by neighbors who told her that someone had broken into her house and that they had already called police (R. 249:15). Ms. Rodriguez noticed that her front door was open and that her VCR and boom box were missing from the front room (R. 249:16). Ms. Rodriguez had purchased the VCR about a month before for about $200 (R. 249:17). She had purchased the boom box about a year before also for about $200 (R. 249:17-18).

When Deputy Sheriff Todd Sisneros arrived shortly thereafter, Ms. Rodriguez gave him a description of the girl with the red blouse and black skirt (R. 249:20, 57). Several hours later, a girl matching that description was located by police (R. 249:58-59). Ms. Rodriguez identified the girl, Sheree Simpson, as the one she had seen earlier that day (R. 249:20, 59).

After being picked up by police, Sheree admitted that she and defendant, as well as some other teens, were hanging out in the vicinity of Ms. Rodriguez's home earlier that day (R. 249:32-33). At one point, Sheree noticed that Ms. Rodriguez's door was open (R. 249:33). When Sheree went to close the door, one of the girls she was with entered the

house and told defendant there was boom box inside (R. 249:34). Defendant entered the house and took the boom box (R. 249:34-35, 60). He then re-entered the house and took the VCR (R. 249:34, 37, 60). Defendant took the boom box and the VCR to his sister's house a few blocks away (R. 249:37, 40).

Based on Sheree's explanation, Deputy Sisneros went to the home of defendant's father, where defendant lived, at about 9:00 p.m. (R. 249:60-61). In defendant's room, under a blanket between the bed and a wall, Deputy Sheriff Sisneros found Ms. Rodriguez's VCR and boom box (R. 249:62-63). Defendant was not home at the time (R. 249-61).

About an hour later, defendant's father called Deputy Sisneros to tell him that defendant was home (R. 249:63-64). When Deputy Sisneros met with defendant shortly thereafter, defendant told Deputy Sisneros that people had brought the items to him for repairs (R. 249:64). Defendant said he didn't know who the people were and could not give the officer any names (R. 249:64).

At trial, Sheree identified the girl who first entered Ms. Rodriguez's home as April, defendant's former girlfriend (R. 249:33, 48). April's brother, David, was also present at the scene (R. 249:33).

Defendant's defense. Defendant's father testified that, on August 14, defendant was in and out of the house most of the day (R. 249:72). However, around 3:30 p.m. or 4:00 p.m., "it seems like that's when he was home" (R. 249:72). Mr. Hasselblad also testified that, while napping around 3:00 p.m. or 3:30 p.m., he was awakened by his dog

barking (R. 249:72-74). At that time, he noticed defendant carrying some electronics equipment (R. 249:73). Defendant told his father that three kids had come over and handed him the stuff (R. 249:73, 74). Defendant then left to go out with them (R. 249:74). When Mr. Hasselblad looked out the window, he recognized defendant's former girlfriend, April (R. 249:74). He also saw a male and another female, but did not recognize them (R. 249:75).

Defendant testified that he saw Sheree Simpson, his former girlfriend April, and April's brother David on August 14 when they stopped by his house in the afternoon and dropped off a VCR and boom box (R. 249:77-78). April knew defendant worked on electronic equipment and asked him to look at the VCR because a line in the back had been ripped out (R. 249:78). Defendant did not ask the teens any questions (R. 249:83). When his father asked him whose equipment it was, defendant told him it was none of his business and took the equipment into his bedroom (R. 249:79). Defendant then left to go to a friend's house (R. 249:82).

Defendant testified that he heard later that the police had come by the house and taken the VCR and boom box (R. 249:79). At the time, he didn't know why "but I got word going through Magna on foot coming home that the cops were out looking for me so I hurried home as soon as possible" (R. 249:79). By the time the officer arrived shortly thereafter, defendant knew that the VCR and boom box were stolen property (R. 249:79).

On cross-examination, defendant admitted that, although he has a hobby of fixing electronics (R. 249:83-84), he has not taken classes for it (R. 249:84-85). He did "[n]ot really" know what a capacitor was, and, when asked to explain what a diode was, he said: "Kind of hard to explain. I'm not really too much into it but I know the chips and everything are on circuit boards and mostly what they do, like sound chips" (R. 249:84). Defendant did not have an oscilloscope (R. 249:84). The only equipment he had was "a soldering gun and solder and wire" (R. 249:84).

Defendant's proposed jury instruction. At the end of a pre-trial hearing on May 21, 2001, the trial court set defendant's trial for July 11, 2001 (R. 248:16). The court then scheduled a final pre-trial conference for July 9, 2001, and ordered that "jury instructions will be due" at that time (R. 248:16). Defendant neither objected to the court's order nor requested an exception for lesser-included offense instructions (R. 248).

When defendant's trial was continued until September, the trial court again instructed the parties to submit their proposed instructions at the final pre-trial conference (R. 252:Tab 1:2). Again, defendant neither objected to the trial court's order nor requested an exception for lesser-included offense instructions (R. 252:Tab 1).

When the court continued defendant's trial to October and reset the final pretrial conference for September 24, 2001, the court indicated, "I've already got your jury instructions" (R. 252:Tab 2:2). Defendant did nothing to indicate he reserved the right to propose further instructions during trial (R. 252:Tab 2:2).

Defendant's trial was held on October 4, 2001 (R. 249). Just before lunch, the prosecutor stated that he believed all the evidence in the case, from both the State and defendant, would be presented by 3:30 p.m., and thus that the case could go to the jury later that afternoon (R. 249:42). The following then occurred:

> Court: In order to do that, we'd have to spend some time on jury instructions at some point and since you're apparently not available over the noon hour today, is that correct, [defense counsel]?
>
> Defense counsel: Right, Your Honor. I have to teach a class. I could take a look at the jury instructions. It's a simple case so I don't imagine I have —
>
> Court: I don't think we should need a lot of discussion. What I'll do is go ahead and put them together the way I propose to give them over the noon hour and those will be sitting on your desk when you get back and if you could find a moment to take a quick look at them and maybe just on the break we could have a discussion about that.

(R. 249:42-43). At the end of the lunch break, without raising any jury instruction issue, defense counsel immediately began cross-examining the State's witness then on the stand (R. 249:44).

At the close of the evidence, the trial court excused the jury and turned to the jury instructions (R. 249:91). After defense counsel noted he had no objections to the instructions compiled by the court, the court turned to the State (R. 249:91). The State indicated it had no problem with the instructions provided by the court (R. 249:91). However, the State continued, "I guess I do have some concerns about the lesser included instruction" (R. 249:91). The trial court agreed:

> Why did I just get this instruction at the end of the noon hour? My order was that any proposed jury instructions were to be in at the time of the pre-trial conference and even at the beginning of the noon hour I could have accommodated, I could have changed the charge to include a lesser included offense. It affects more than — I mean, it's not just a matter of sticking it in. You also have to change other instructions to accommodate it and why it's submitted this late, I can't understand. I mean it's just plain late.

(R. 249:92).

Defense counsel agreed that he "should have given it to you before the noon hour" (R. 249:93). Counsel admitted, "I simply left without giving it to you" (R. 249:93).

The court then ruled:

> I'm rejecting the instruction first of all because it's late but second of all I'm rejecting it because I don't think that a jury could rationally find, well, in the second instance, it's not a lesser included offense. . . . It is not an offense that consists of less than all of the elements of the crime of [burglary]. It's a very much separate offense and in fact, he could be charged and convicted of both offenses in this case. Maybe that's not the case but anyway—and thirdly, there is no evidence in this case from which a jury could rationally find that he knew that it had been stolen or believed that it had been stolen. There was no testimony from him that he believed it to be stolen or that he knew that it had been stolen. That's the instruction that you requested. He was never asked whether he believed it had been stolen. He was never asked whether he knew it had been stolen and the instruction that you presented doesn't allow for conviction if he simply had reason to know.

(R. 249:93-94).

Defense counsel objected, arguing first, that "I simply put the language of the statute in, Your Honor," and second:

> Let me say this, Your Honor, I understand that I should have given it to you before lunch but we thought this was going to go until tomorrow. We never know if we're going to put lesser included

> instructions in, first of all until I know whether my client is going to testify, whether or not the evidence comes in that way. I mean, I write one up so that we could do that but I don't know even until I talk to my client or all the evidence is presented whether we're going to ask for it and many times we don't ask for it on these occasions.

(R. 249:94-95). The court responded:

> Well, you can always submit it in advance and withdraw it but if I'm not even alerted to the possibility that there's a lesser included theory, I mean that is some of the most difficult decisions judges make in these cases, whether to instruct on the lesser included offense and the reason why I ask for instructions to be submitted in advance of trial is so that I can do that research and do that thinking deliberately and not on the spur of the moment.

(R. 249:95). The court further explained, "[a]ttempted theft could be a lesser included offense of burglary but theft by receiving, I don't see any stretch by which that can be a lesser included offense in burglary. But if there is a rational basis for doing that, that's the reason we need to have a heads up on this other than at the last minute" (R. 249:96). "And frankly, if this case were simply a case of theft of receiving stolen property and these are the elements of that, I'd grant a directed verdict. The case hasn't been made out. The jury could not find beyond a reasonable doubt these elements" (R. 249:97).

Defense counsel again objected, arguing:

> I don't have to present all the possible lesser included offenses that I might put in until—strategically I don't have to [do] that until the evidence is in. I don't know that there's anything that requires me to do that.
>
> . . . .
>
> I don't think we have to put the State on notice of a lesser included.

(R. 249:97-98).

The court responded: "When I as a Judge order the jury instructions be in as of a certain day, I don't know that you [c]an disregard that without peril, without risk, okay?" (R. 249:98). The court concluded:

> You know it would be different if you were surprised. I disagree. I strongly disagree that it's your strategic option to disregard my order to have your jury instructions in by a certain time. On the other hand if you were surprised by evidence, that would be one thing. But if this is your theory from day one, which it sounds like it was, then I think you need to have them in when I order them in. We'll be in recess.

(R. 249:98-99).

Defendant renewed his objection to the court's ruling in his motion for new trial (R. 189-90, 196-99; R. 250:Tab 1). After argument, the court denied defendant's motion:

> [P]art of the basis for my decision is the belie[f] is that the instruction was submitted late. . . . I always make it an order in the case that instructions are to be in at the time of the final pretrial conference but, you know, I recognize that things can come up during the trial and I don't hold people religiously to that. But after we've got to the point where the final jury instructions are prepared, absent surprise by something that happens during the trial, I'm not prepared, typically, at that time to entertain new jury instructions. Only in the event of a surprise would I be willing to do that and it's my firm recollection in this case that we had put the jury, I had put the jury instructions in final form.
>
> . . .
>
> Secondly, it's my view that even that aside, I would not have given the lesser included offense instruction in this case. I think that the relationship between the charge of receiving stolen property is insufficiently related to the charge of burglary to justify the evidence in this case, a lesser included offense.
>
> And, thirdly, I don't think the jury could have rationally convicted the defendant of theft by receiving stolen property on the evidence that was presented in this case. The only evidence was the defendant's own testimony. The only alternate theory of how he received this equipment, this stereo equipment was his own

> testimony and if the jury believed his testimony, there was nothing in his testimony that suggested that he knew or had reason to know that his property was stolen.

(R. 250:Tab 1:16-17).

Defendant's proposed jury instruction contains no date indicating when it was filed (R. 116). The instruction appears in the record immediately after the State's proposed instructions dated July 9, 2001 (R. 111-16).

SUMMARY OF THE ARGUMENT

Defendant claims that the trial court improperly rejected his proposed lesser-included offense instruction because the instruction was timely presented and because he was entitled to the instruction under the general rule governing defense requested lesser included offense instructions. Neither of defendant's claims have merit. Moreover, defendant was not entitled to his proposed instruction bcause it did not accurately state the applicable law.

Point I. The trial court properly rejected defendant's proposed instruction as untimely. As allowed under the rules of criminal procedure, the trial court twice ordered that all proposed jury instructions be submitted at the final pre-trial conference. Defendant did not object to the court's orders or request an exception to those orders for lesser-included offense instructions. Then, during the one-day trial, the court informed the parties that it would be compiling the jury instructions over the lunch break. Defendant did not file his proposed jury instruction until he returned from lunch. Moreover, defendant did not ask to discuss the instruction at that time but, rather

immediately began cross-examining the State's witness who was then on the stand. Under such circumstances, the trial court did not abuse its discretion in rejecting defendant's instruction as untimely.

Point II. The trial court properly rejected defendant's proposed lesser-included offense instruction because defendant's own testimony did not allow the jury to both acquit defendant of the greater crime and convict him of the lesser. Conviction for receiving stolen property requires evidence that defendant knew or had reason to know the property was stolen at the time he received it. Defendant's testimony at trial was that he only learned the property was stolen *after* the police had already confiscated it. Because defendant's testimony supported a complete innocence defense and controverted a key element of the crime of possession of stolen property, defendant was not entitled to his lesser-included offense instruction.

Point III. Even assuming defendant's first two claims have merit, defendant was not entitled to his proposed instruction because it did not accurately state the applicable law. Defendant's instruction requires that defendant *unlawfully and intentionally* receive, retain, or dispose of property knowing it has been stolen or believing that it has probably been stolen. The statute defining the crime of receiving stolen property does not contain the emphasized language. Because defendant's proposed instruction contains two elements not contained in the statutory definition, the instruction misstates the law, and thus, defendant had no right to it. Although the trial court did not reject defendant's

instruction on this basis, this Court may affirm the trial court's ruling on any basis apparent in the record.

ARGUMENT

I. WHERE DEFENDANT DID NOT PROPOSE HIS LESSER-INCLUDED OFFENSE INSTRUCTION UNTIL TWO COURT-IMPOSED DEADLINES HAD PASSED AND THE TRIAL COURT HAD ALREADY COMPILED ITS INSTRUCTIONS, THE COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE INSTRUCTION AS UNTIMELY

Defendant challenges on numerous grounds the trial court's ruling that his proposed jury instruction was untimely. Aplt. Br. at 30-32, 34-35, 37, 39. None of defendant's claims have merit.

"Trial courts must be accorded reasonable latitude to move trials along." *State v. Evans*, 668 P.2d 566, 568 (Utah 1983). Thus, a trial court's ruling that a proposed jury instruction is untimely is reviewed for "abuse of discretion." *Id.*; *but see Schwartz v. Benzow*, 2000 UT App 203, 2000 WL 33250573, at *1 (memorandum decision) (reviewing rejection of instruction as untimely "for correctness") (Addendum C).

A. Defendant's appellate claim that he submitted his instruction prior to trial contradicts his own counsel's statements below.

Defendant claims that the trial court improperly rejected his proposed instruction as untimely because "the record indicates that defense counsel submitted the proposed instruction at the first pretrial conference in July 2001, three months before . . . trial." Aplt. Br. at 30-32. Defendant relies on two parts of the record to support his claim. Defendant notes first that a court clerk, who is required to place documents in

chronological order in preparing the record on appeal, "placed the proposed instruction between the State's proposed instructions . . . which were filed on July 9, 2001, and the minute entry noting the postponement of the original trial date on July 10, 2001." Aplt. Br. at 32. He notes second that the trial court, at the August 2001 pre-trail conference, told the parties it "'already [had] your jury instructions and requested voir dire.'" Aplt. Br. at 32 (citing R. 252B:2). Defense counsel's own admissions below defeat his claim.

At trial, the court announced it would be compiling jury instructions over the lunch break (R. 249:42-43). During a conference on instructions a short while later, the court asked defense counsel why he had not filed his instruction before lunch (R. 249:92). Counsel never argued that he had in fact submitted his instruction before trial (R. 249:92-99). To the contrary, counsel admitted that he had only submitted his instruction after lunch when he acknowledged that he "should have given it to [the court] before the noon hour" and "apologize[d] for not making that known sooner" (R. 249:93). Similarly, when the issue was revisited in defendant's motion for new trial, counsel did not argue that he had submitted his instruction before trial (R. 250:Tab 1). Rather, he again admitted, "I simply brought the lesser included back from lunch" (R. 250:Tab 1:13, 14).

The record upon which defendant now relies to contradict those admissions is insufficient. First, defendant's proposed instruction contains no date and thus no indication of where it should be placed chronologically in the file. Absent such indication, the court clerk's after-the-fact logical placement of the instruction with the State's instructions offers little insight as to when the instruction was actually proposed.

Second, when the trial court made its general statement that it had received the parties' proposed instructions, the court had already twice ordered the parties to submit their instructions, and the court had already received the State's proposed instructions (R. 248:16; R. 252:Tab 1:2; R. 111-15). The court's statement, then, could easily reflect its reasonable conclusion that, having received no instructions from defendant, the State's instructions were the only instructions the parties intended to propose.

Given defense counsel's repeated admissions below that he did not file his instruction until after lunch on the day of trial, defendant's claim that the trial court erred in rejecting his instruction as untimely because he submitted it before trial fails.

B. Defendant's claim that rule 19, Utah Rules of Criminal Procedure, allowed him to ignore the trial court's pre-trial orders requiring submission of proposed jury instructions by the final pre-trial conference fails under the rule's plain language.

Twice prior to trial, the trial court ordered that proposed jury instructions be submitted by the final pre-trial conference (R. 248:16; R. 252:Tab 1:2). On appeal, defendant claims that rule 19, Utah Rules of Criminal Procedure, gave him leave to ignore the court's orders. Aplt. Br. at 31-37. Rule 19 does not support defendant's claim.

In making his argument, defendant relies on rule 19 as it was amended effective November 1, 2001. Aplt. Br. at 31-33 (citing language in subsections (a) and (b) that appears in amended rule but not the previous version); *see also* Utah R. Crim. P. 19 (2002) (Addendum A). However, defendant's trial was held on October 4, 2001 (R. 249). Because defendant's trial occurred prior to the November amendment of the rule, the preceding version applies in considering defendant's claim. *See State v. Nelson-*

Waggoner, 2000 UT 59, ¶¶ 4-5, 17 n.6, 6 P.3d 1120 (applying rule of evidence as it existed at time of trial), *cert. denied*, 528 U.S. 1164 (2000); *State v. Decorso*, 1999 UT 57, ¶ 26, 993 P.2d 837.[1]

When interpreting a court rule, this Court applies the same rules of construction applicable to statutes. *State v. Vargas*, 2001 UT 5, ¶ 31, 20 P.3d 271. "When faced with a question of statutory construction, [this Court] look[s] first to the plain language of the statute." *Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 520 (Utah 1997) (citation omitted). Terms are interpreted "'according to their commonly accepted meaning unless the ordinary meaning . . . results in an application that is either unreasonably confused, inoperable, . . . or in blatant contradiction of the express purpose of the statute.'" *State ex rel. L.P.*, 981 P.2d 848, 850 (Utah App. 1999) (citations omitted)).

On October 4, 2001, rule 19(a) provided:

> At the close of the evidence or at such earlier time as the court reasonably directs, any party may file [a] written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement.

Utah R. Crim. P. 19(a) (2001).

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[1]In relying on the version of the rule in effect at the time of defendant's trial, the State does not concede that a different result would occur under the amended rule. Because the amended rule was not in effect at the time of defendant's trial, this Court need not decide that issue.

This provision clearly states that parties may submit proposed jury instructions "[a]t the close of the evidence *or at such earlier time as the court reasonably directs.*" Utah R. Crim. P. 19 (emphasis added). Thus, under the plain language of subsection (a), a trial court may order parties to submit their proposed jury instructions prior to the close of evidence.

Nothing in the remaining subsections of the rule limits the trial court's authority under subsection (a) to order that instructions be submitted prior to the close of evidence. *See* Utah R. Crim. P. 19(b)-(d). Moreover, nothing in the remaining subsections allows a criminal defendant to ignore the trial court if it enters such an order. *Id.*

Consequently, defendant's claim that rule 19 authorized him to submit his proposed instruction after the court's pre-trial deadlines fails.

C. Where defendant never objected to the trial court's pre-trial orders or its mid-trial compilation of jury instructions, the court's rejection of defendant's instruction as untimely was not an abuse of discretion.

Defendant claims the trial court abused its discretion in rejecting his proposed instruction as untimely because (1) before lunch, the court "affirmatively represented that the parties could submit additional instructions following the lunch break," Aplt. Br. at 34; and (2) "[b]asic fairness supports allowing parties to offer instructions at the close of the evidence," "strategic reasons argue against requesting lesser offense instruction in advance," and the evidence supports his instruction, Aplt. Br. at 34, 35. Neither of defendant's claims have merit.

1. Defendant's claim that the court affirmatively indicated it would accept instructions after the lunch break is not supported by the record; moreover, given the trial court's pre-trial orders, defendant had no reasonable basis upon which to believe instructions would be accepted at trial.

Defendant claims that, even if his proposed instruction was not submitted until trial, the trial court improperly rejected it because the court "affirmatively represented that the parties could submit additional instructions following the lunch break" and "defense counsel reasonably relied on the trial judge's representations based on his past practice with other judges." Aplt. Br. at 31, 34, 37. Defendant's claim is not supported by the record.

Prior to lunch on the day of trial, the prosecutor stated that he believed all the evidence in the case would be presented by 3:30 p.m., and thus that the case could go to the jury later that afternoon (R. 249:42). The following then occurred:

> Court: In order to do that, we'd have to spend some time on jury instructions at some point and since you're apparently not available over the noon hour today, is that correct, [defense counsel]?
>
> Defense counsel: Right, Your Honor. I have to teach a class. I could take a look at the jury instructions. It's a simple case so I don't imagine I have —
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> Court: I don't think we should need a lot of discussion. What I'll do is go ahead and put them together the way I propose to give them over the noon hour and those will be sitting on your desk when you get back and if you could find a moment to take a quick look at them and maybe just on the break we could have a discussion about that.

(R. 249:42-43). Nothing in the court's language even hints that the court would entertain new instructions after the lunch period.

Moreover, prior to trial, the trial court twice ordered that proposed jury instructions be submitted by the final pre-trial conference (R. 248:16; R. 252:Tab 1:2). Defendant neither objected to the court's orders nor requested an exception for lesser-included offense instructions. Under such circumstances, defendant had no reasonable basis upon which to rely on other courts' practices in assuming the court would accept additional jury instructions during trial.

Consequently, defendant's claim that he reasonably relied on the trial court's representations at trial in offering his instruction after lunch fails.

2. *State v. Evans* defeats defendant's claim that "basic fairness," "strategic reasons," and the evidence at trial render the trial court's ruling an abuse of discretion.

Defendant claims that, even if he submitted his instruction late, the trial court abused its discretion in rejecting the instruction as untimely because "[b]asic fairness supports allowing parties to offer instructions at the close of the evidence," because "strategic reasons argue against requesting lesser offense instruction in advance," and because the evidence supports his instruction, Aplt. Br. at 34, 35. *State v. Evans*, 668 P.2d 566 (Utah 1983), and sound policy considerations defeat his claim.

In *State v. Evans*, 668 P.2d 566, 567 (Utah 1983), the trial court announced at the close of evidence that it would recess for a period during which it would compile its jury instructions. When the court reconvened, Evans proffered lesser-included offense

instructions, which the trial court rejected. *Id.* On appeal, Evans challenged the trial court's ruling, arguing that the evidence "was sufficient to support a jury instruction on [a] lesser included offense." *Id.* In rejected Evan's claim, the supreme court noted that "[c]ounsel had not advised the court of the necessity for an extension of time to prepare [his instructions]; nor . . . had he earlier notified the court that he even intended to submit them." *Id.* "[H]aving failed to timely request an instruction . . . , the defendant is not now in any position to complain of the court's failure to give it." *Evans*, 668 P.2d at 567; *see also Schwartz v. Benzow*, 2000 UT App 203, 2000 WL 33250573, at *1 (memorandum decision) (affirming trial court's denial of proposed instruction filed after court-ordered deadline where party had "fail[ed] to notify the court that she wished to submit jury instructions by the court's specified deadline") (Addendum C). Rather, "counsel's failure to notify the court that he wished to submit requested instructions knowing that the court would be preparing them during the recess, carries with it the same consequence of failing to submit them at all." *Evans*, 668 P.2d at 568.

Evans disposes of defendant's claim here. Twice prior to trial, the trial court ordered that all proposed jury instructions be filed by the final pre-trial conference (R. 248:16; R. 252:Tab 1:2). Defendant neither objected to the court's orders nor requested an exception for lesser included offense instructions. Then, at trial, the court indicated before lunch that it would be compiling its proposed jury instructions over the lunch break (R. 249:42). Defendant again did nothing to alert the court that he intended to submit additional instructions (R. 249:42-43). Thus, despite numerous opportunities

either to present his instruction to the court in a timely manner or to inform the court that such an instruction may be forthcoming, defendant did nothing until after the court had compiled its instructions. Under these facts, the trial court did not abuse its discretion in refusing to accept defendant's belated request. *Evans*, 668 P.2d at 567-68.

Defendant's attempts to distinguish *Evans* are unavailing. First, defendant claims that *Evans* does not apply because "defense counsel below specifically preserved the denial of the lesser offense instruction for appeal by following the procedures set forth in Rule 19." Aplt. Br. at 40. However, when *Evans* was decided, the rule governing jury instructions was identical to rule 19 at the time of defendant's trial. *See* Utah Code Ann. § 77-35-19 (1982) (Addendum A); *see also* Point I.B. *supra*. Thus, defendant's reliance on rule 19 to distinguish *Evans* is unfounded.

Second, defendant claims that *Evans* does not apply because "defense counsel . . . follow[ed] up [his] request [at trial] with a motion for new trial." Aplt. Br. at 40. However, "[r]aising an issue in a post-trial motion . . . does not [automatically] preserve that issue for appeal." *Estate of Covington v. Josephson*, 888 P.2d 675, 678 & n.6 (Utah App. 1994); *see also State v. Erickson*, 722 P.2d 756, 759 (Utah 1986) (per curiam). Rather, before this Court will find the matter preserved, the trial court, in ruling on the motion, must either expressly or implicitly waive defendant's prior waiver. *See, e.g., State v. Belgard*, 830 P.2d 264, 266 (Utah 1992) (per curiam) (holding "trial court in effect reopened the trial when it held an evidentiary hearing to address defendant's claim" after trial); *State v. Matsamas*, 808 P.2d 1048, 1053 (Utah 1991); *State v. Johnson*, 821

P.2d 1150, 1161 (Utah 1991). Here, in denying defendant's motion for new trial, the trial court specifically re-iterated its untimeliness ruling (R. 250:Tab 1:16-17). Thus, defendant's reassertion of his claim in his motion for new trial did nothing to cure his waiver under *Evans*.

Third, defendant claims that *Evans* does not apply because "the trial judge in this case never indicated that he planned to instruct the jury immediately after the lunch recess or that the time for requesting additional instructions had passed." Aplt. Br. at 40. However, *Evans* nowhere suggests that the trial court's intention to immediately instruct the jury after compiling its instructions was the determinative issue in affirming the trial court's untimeliness ruling; rather, the determinative issue was that defendant had neither proffered his proposed instructions nor intimated that they might be forthcoming until after the trial court, with notice to the parties, had compiled its instructions. *Evans*, 668 P.2d at 567. And, as previously discussed, where the court issued two pre-trial orders requiring that instructions be submitted before trial, and then expressly stated its intention to compile jury instructions over the lunch hour, defendant should have clearly known that "the time for requesting additional had passed." Aplt. Br. at 40.

Fourth, defendant claims that *Evans* does not apply here because the evidence supports his lesser-included offense instruction. Aplt. Br. at 31. However, the defendant raised the same claim on appeal in challenging that trial court's ruling in *Evans*. *Evans*, 668 P.2d at 567. The supreme court rejected it. *Id.* at 567-68.

Finally, defendant claims that *Evans* does not apply because "basic fairness supports allowing parties to offer instructions at the close of the evidence" and "strategic reasons argue against requesting lesser offense instruction in advance." Aplt. Br. at 34-35. Both of these challenges, however, could and should have been raised when the trial court first entered its pre-trial orders or, at the latest, when the court indicated it would be compiling its instructions over the lunch break. *Cf. State v. Johnson,* 774 P.2d 1141, 1144 (Utah 1989) (holding "'a contemporaneous objection or some form of *specific* preservation of claims of error must be made a part of the trial court record before an appellate court will review such claims on appeal'") (citation omitted). Neither serves as an after-the-fact justification for remaining silent.

Moreover, defendant's "basic fairness" and "strategic reasons" claims raise serious equity issues for both the trial court and the State when, as here, defendant's request for a lesser offense instruction involves an offense that is not "necessarily included" in the offense charged.[2]

As the trial court noted, and indeed as this case highlights, *see* Points II and III *infra*, whether to instruct the jury on such lesser-included offenses "[are] some of the most difficult decisions judges make in these cases" (R. 249:95). A responsible court,

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[2]A lesser offense is "necessarily included" in the greater when "the greater cannot be committed without necessarily having committed the lesser." *State v. Baker*, 671 P.2d 152, 155-56 (Utah 1983). Under *Baker*, 671 P.2d 152 (Utah 1983), a defendant is, upon proper request, entitled not only to a lesser included offense instruction on necessarily included offenses but on any lesser offenses that are "related" to the charged offense "because some of their statutory elements overlap, and . . . the evidence at the trial of the greater offense includes proof of some or all of those overlapping elements." *Id.* at 159.

therefore, may understandably want "a heads up" that an instruction may be forthcoming so that the court may "do . . . research and . . . think[] deliberately" in deciding its appropriateness (R. 249:95-96). Yet, if "basic fairness" and "strategic reasons" require courts to accept surprise instructions at the close of evidence despite prior orders to propose them earlier, the responsible court may very well feel compelled to make its decision "on the spur of the moment," thereby increasing the possibility of error, since the only other option would be to impose a potentially lengthy delay on the proceedings in order to given the instructions their due consideration (R. 249:95). Certainly, neither "basic fairness" nor "strategic reasons" justify this result.

Moreover, as defendant correctly notes, the State "bear[s] the burden of proving guilt beyond a reasonable doubt, even on lesser offenses." Aplt. Br. at 35. Yet, if a defendant can ignore a court order that instructions be submitted prior to trial and wait to request a lesser included offense instruction until the close of evidence, the State will have been placed in the untenable position of not knowing what it has to prove until it is too late to prove it. In addition, the State, like the court, is forced to address the appropriateness of the proposed instruction, *see* Point II *infra*, and the correctness of the proposed instruction, *see* Point III *infra*, "on the spur of the moment," without adequate time to research either issue.

As the supreme court held in *State v. Baker*, 935 P.2d 503, 506-07 (Utah 1997), "[b]oth parties"—not just the State—"share a duty to help ensure a *fair trial.*" Thus, defendant has no more right to an "acquittal by ambush" than does the State to a "trial by

ambush." *Jones v. State*, 575 S.E.2d 456, 459 (Ga. 2003). Yet, this is exactly what a defendant is encouraged to do if "basic fairness" and "strategic reasons" allow him, contrary to court orders otherwise, to withhold such lesser-included offense instructions until the close of evidence.

Surprises at trial, of course, may necessitate consideration of instructions offered outside a trial court's orders. However, where, as the court noted here, defendant planned to submit his instruction "from day one" (R. 249:98-99), this was not such a case.

Under the totality of the circumstances, then, the trial court did not abuse its discretion in rejecting defendant's lesser-included offense instruction as untimely.

D. Defendant cannot establish that the trial court's rejection of his instruction constituted manifest injustice where case law supports the trial court's ruling.

Finally, defendant argues that, "[e]ven if defense counsel had delayed in requesting the instruction, the trial judge . . . committed a manifest injustice in refusing to instruct the jury on [his] theory of the case." Aplt. Br. at 31.

"When reviewing a claim of manifest injustice, [this Court] generally use[s] the same standard that is applied to determine whether plain error exists." *State v. Rudolph*, 970 P.2d 1221, 1226 (Utah 1998). Under that standard, defendant must show that the trial court committed error, that the error should have been obvious, and that the error was "of sufficient magnitude that it affect[ed] the substantial rights of the party." *Id.* (citation and internal quotation marks omitted).

Here, defendant's complete argument in support of his manifest injustice claim is that, "[a]s demonstrated previously, the trial court plainly erred in refusing to give the jury the option of convicting [him] based on the facts rather than what the prosecutor opted to charge." Aplt. Br. at 42-43. However, as discussed above, none of defendant's prior claims establish that the trial court erred, let alone obviously erred, in rejecting defendant's instruction as untimely. *See* pp. 13-25 *infra*.

Consequently, defendant's challenge to the trial court's rejection of his instruction as untimely fails.

II. THE TRIAL COURT PROPERLY REJECTED DEFENDANT'S LESSER-INCLUDED OFFENSE INSTRUCTION WHERE DEFENDANT'S OWN TESTIMONY, IF BELIEVED, WOULD ACQUIT HIM ON POSSESSION OF STOLEN PROPERTY

Defendant claims that the trial court "erred in refusing to give the lesser offense instruction" because "the crimes of burglary and receiving stolen property overlapped" and the evidence at trial "supported acquitting [him] of burglary and convicting him of receiving stolen property." Aplt. Br. at 22, 23. However, because defendant's own testimony at trial was inconsistent with a finding of guilt for possession of stolen property, the trial court properly rejected defendant's instruction.

A defendant generally has the right to a lesser-included offense instruction if

> "(1) the two offenses are related because some of their statutory elements overlap, and the evidence at trial of the greater offense involves proof of some or all of those overlapping elements; and (2) the evidence provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting the defendant of the lesser-included offense."

State v. Kell, 2002 UT 106, ¶ 23, 61 P.3d 1019 (quoting *State v. Evans*, 2002 UT 22, ¶ 18, 20 P.3d 888).

However, a defendant has no right to a lesser-included offense instruction where he denies any complicity at all "and thus lays no foundation for any intermediate verdict." *State v. Doughery*, 550 P.2d 175, 176 (Utah 1976), *disapproved of on other grounds by State v. Crick*, 675 P.2d 527, 531 (Utah 1983); *see also State v. Shabata*, 678 P.2d 785, 790 (Utah 1984) (holding that where "[a]ll the evidence defendant presented at trial was to the effect that he had not caused [the victim's] death, . . . [d]efendant's own theory of defense precluded the requested [lesser-included offense] instruction on manslaughter"); *State v. Crick*, 675 P.2d 527, 533-534 (Utah 1983) (holding manslaughter instruction properly refused in murder conviction where defendants attempted to show they had not caused victim's death); *State v. Baker*, 671 P.2d 152, 159-60 (Utah 1983) (holding defendant was not entitled to lesser-included offense instruction against burglary charge where "[t]he thrust of the defendant's evidence . . . was to negate any specific intent at all, not to prove the existence of one of the intents necessary for criminal trespass"); *State v. Cox*, 826 P.2d 656, 662-63 (Utah App. 1992) (holding instruction on criminal trespass properly denied in burglary conviction where defendant testified he never entered the premises); *see also United States v. Brown*, 26 F.3d 119, 120 (11th Cir. 1994) ("When a defendant relies on an exculpatory defense that, if believed, would lead to acquittals on both the greater and lesser charges, it is no abuse of discretion to refuse to instruct the jury on a lesser included offense."); *State v. German*, 30 P.3d 360, 362 ¶ 11 (Mont. 2001)

("A lesser-included offense instruction is not supported by the evidence when the defendant's evidence or theory, if believed, would require an acquittal."); *Walker v. State*, 876 P.2d 646, 649 (Nev. 1994) ("To be entitled to an instruction as to a lesser included offense, the defendant's theory of defense must be consistent with a conviction for the lesser offense.").

In this case, defendant requested a lesser-included jury instruction on possession of stolen property (R. 116). Defendant's request was based on his own testimony that he did not participate in the burglary but rather received the property later that day at his home from three friends who wanted him to fix the VCR (R. 249:92; R. 250:Tab 1:3-4). Defendant argued that this testimony, combined with his father's somewhat corroborating testimony, the location of the equipment under a blanket in his room, and his own testimony on cross-examination suggesting he didn't know much about electrical components, supported his instruction (R. 249:92; R. 250:Tab 1:3-4). The trial court rejected defendant's argument, ruling that where "[t]here was no testimony from [defendant] that he believed [the property] to be stolen or that he knew that it was stolen," the evidence did not support defendant's instruction (R. 249:93-94).

Even assuming arguendo that possession of stolen property is sufficiently related to burglary to support a lesser-included offense instruction, defendant's own testimony, in which he denied complicity in either the charged crime or the lesser included, rendered the evidence insufficient to support the instruction in this case. *See Shabata*, 678 P.2d at 790; *Crick*, 675 P.2d at 533-34; *Baker*, 671 P.2d at 159-60; *Doughery*, 550 P.2d at 176;

Cox, 826 P.2d at 662-63; *Brown*, 26 F.3d at 120; *German*, 30 P.3d at 362; *Walker*, 876 P.2d at 575.

A person is guilty of receiving stolen property if:

[1] he receives, retains, or disposes of the property of another

[2] knowing that it has been stolen, or believing that it probably has been stolen, OR

[1a] [he] conceals, sells, withholds or aids in concealing, selling or withholding the property from the owner

[2a] knowing the property to be stolen

[3] intending to deprive the owner of it.

Utah Code Ann. § 76-6-408 (1999).

Here, defendant testified that he did not learn that the property was stolen until *after* he had heard that the police had confiscated it (R. 249:79, 81-82). This testimony, if believed, would acquit him of possession of stolen property. Thus, "[t]he thrust of the defendant's evidence . . . was to negate any specific intent at all, not to prove the existence of . . . the intent[] necessary for [the lesser-included offense]." *Baker*, 671 P.2d at 159-60.

Because defendant's testimony "la[id] no foundation for any intermediate verdict," *Doughery*, 550 P.2d at 176, the trial court properly rejected his lesser-included offense instruction as unsupported by the evidence.

III. DEFENDANT WAS NOT ENTITLED TO HIS LESSER-INCLUDED OFFENSE INSTRUCTION ON POSSESSION OF STOLEN PROPERTY WHERE THE INSTRUCTION CONTAINED TWO ELEMENTS NOT REQUIRED BY STATUTE AND THUS DID NOT ACCURATELY STATE THE APPLICABLE LAW

Both during trial and in response to defendant's motion for new trial, the State argued that, in addition to rejecting defendant's instruction because it was untimely and unsupported by the evidence, the trial court should reject it because it did not accurately define the applicable law (R. 222; R. 249:96-97; R. 250:Tab 1:12). Although the trial court did not rule on this part of the State's argument, this Court should affirm the trial court's ruling on this ground because it is apparent in the record. *See State v. Allred*, 2002 UT App 291, ¶ 11, 55 P.2d 1158 ("[I]t is well settled that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court.") (citation and internal quotation mark omitted).

"Generally, a defendant is entitled to instruction on his theory of the case if there is a reasonable basis in the evidence to justify giving the requested instruction." *State v. Padilla*, 776 P.2d 1329, 1331 (Utah 1989). However, "[t]he trial court may reject the defendant's instruction where the instruction incorrectly states the law." *State v. Bluff*, 2002 UT 66, ¶ 21, 52 P.3d 1210; *State v. James*, 819 P.2d 781, 798-99 (Utah 1991); *State v. Dumas*, 721 P.2d 502, 506 (Utah 1986). An instruction that adds elements to a crime beyond that required by statute incorrectly states the law. *Bluff*, 2002 UT 66, at

¶ 23 (affirming trial court's rejection of proposed instruction that added elements to felony murder beyond those required by statute).

In this case, defendant asked the trial court to instruct the jury on possession of stolen property as a lesser-included offense of burglary (R. 116). As stated previously, under section 76-6-408, a person is guilty of receiving stolen property if:

> [1] he receives, retains, or disposes of the property of another
>
> [2] knowing that it has been stolen, or believing that it probably has been stolen, OR
>
> [1a] [he] conceals, sells, withholds or aids in concealing, selling or withholding the property from the owner
>
> [2a] knowing the property to be stolen
>
> [3] intending to deprive the owner of it.

Utah Code Ann. § 76-6-408 (1999).

Defendant's proposed instruction, in contrast, provided:

> Before you can convict the defendant of the crime of Receiving Stolen Property, Theft, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:
>
> 1. In Salt lake County, on or about August 14, 2000, the defendant;
>
> 2. *Unlawfully*; and
>
> 3. *Intentionally*;
>
> 4. Received, retained or disposed of property of another;

5. Knowing that it had been stolen, or believing that it probably had been stolen, or concealed or withheld or aided in concealing or withholding property of another knowing it to be stolen; and

6. Intended to deprive the owner of the property.

(R. 116) (emphasis added).

A simple comparison of the statutory elements and the elements set forth in defendant's instruction reveals that defendant's instruction includes two elements—that he received the property *unlawfully* and that he received it *intentionally*—not required under the statute.

Thus, under defendant's instruction, the State had to prove not only that defendant received property knowing it had been stolen or had probably been stolen—as required under the statute—but also that he did so "'other than accidental[ly] or careless[ly]'" and "'without justification.'" *State v. Hobbs*, 2003 UT App 27, ¶ 18, 64 P.3d 1218 (explaining impact of inserting "intentionally" and "unlawfully" into criminal statute) (quoting *State v. Durant*, 674 P.2d 638, 645 (Utah 1983)); *see also* Utah Code Ann. § 76-2-103 (1999) (providing that person acts "[i]ntentionally . . .with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result").

Because defendant's instruction increased the burden of the State beyond that required under the statute, it was clearly an incorrect statement of the law. *See Bluff*,

2002 UT 66 at ¶ 23. Consequently, defendant was not entitled to it. *Bluff*, 2002 UT 66, at ¶ 21; *James*, 819 P.2d at 798-99; *Dumas*, 721 P.2d at 506.[3]

CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's conviction and sentence.

RESPECTFULLY SUBMITTED 17 April 2003.

MARK L. SHURTLEFF
Utah Attorney General

Karen A. Klucznik

KAREN A. KLUCZNIK
Assistant Attorney General

[3]Although defendant claims that, instead of rejecting his instruction, the trial court should have taken steps to correct it, defendant cites no legal authority in Utah, nor has the State found any, for that proposition. Rather, our courts have simply held that "[t]he trial court may reject the defendant's instruction where the instruction incorrectly states the law." *Bluff*, 2002 UT 66, at ¶ 21; *see also James*, 819 P.2d at 798-99; *Dumas*, 721 P.2d at 506.

CERTIFICATE OF MAILING

I certify that on 17 April 2003, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLEE*** to Kent R. Hart and David V. Finlayson, Salt Lake Legal Defender Assoc., 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, Attorney for Appellant.

Karen A. Klucznik

Addenda

Addendum A

Rule 19. Instructions.

(a) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement.

(b) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused.

(c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

(d) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(e) Arguments of the respective parties shall be made after the court has instructed the jury. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.

Rule 19. Instructions.

(a) After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the alleged crime, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to each juror. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

(c) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties waive this requirement. Final instructions shall be in writing and at least one copy provided to the jury. The court shall provide a copy to any juror who requests one and may, in its discretion, provide a copy to all jurors.

(d) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused.

(e) Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In statig the objection the party shall identify the matter to whcih the objection is made and the ground of the objection.matter to which he objects and the ground of his objection.

(f) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(g) Arguments of the respective parties shall be made after the court has given the jury its final instructions. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court. (Amended effective November 1, 2001.)

Utah Code Ann. § 77-35-19 (1982)

77-35-19. Rule 19 — Instructions. (a) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement.

(b) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused.

(c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

(d) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(e) Arguments of the respective parties shall be made after the court has instructed the jury. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.

Addendum B

Utah Code Ann. § 76-6-408 (1999)

76-6-408. Receiving stolen property — Duties of pawnbrokers.

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

(2) The knowledge or belief required for Subsection (1) is presumed in the ase of an actor who:

(a) is found in possession or control of other property stolen on a separate occasion;

(b) has received other stolen property within the year preceding the receiving offense charged;

(c) being a dealer in property of the sort received, retained, or disposed, acquires it for a consideration which he knows is far below its reasonable value; or

(d) if the value given for the property exceeds $20, is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or an agent, employee, or representative of a pawnbroker or person who buys, receives, or obtains property and fails to require the seller or person delivering the property to:

(i) certify, in writing, that he has the legal rights to sell the property;

(ii) provide a legible print, preferably the right thumb, at the bottom of the certificate next to his signature; and

(iii) provide at least one other positive form of picture identification.

(3) Every pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee, or representative of a pawnbroker or person who fails to comply with the requirements of Subsection (2)(d) shall be presumed to have bought, received, or obtained the property knowing it to have been stolen or unlawfully obtained. This presumption may be rebutted by proof.

(4) When, in a prosecution under this section, it appears from the evidence that the defendant was a pawnbroker or a person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or was an agent, employee, or representative of a pawnbroker or person, that the defendant bought, received, concealed, or withheld the property without obtaining the information required in Subsection (2)(d), then the burden shall be upon the defendant to show that the property bought, received, or obtained was not stolen.

(5) Subsections (2)(d), (3), and (4) do not apply to scrap metal processors as defined in Section 76-10-901.

(6) As used in this section:

(a) "Receives" means acquiring possession, control, or title or lending on the security of the property;

(b) "Dealer" means a person in the business of buying or selling goods.

Addendum C

Not Reported in P.2d
2000 UT App 203
(Cite as: 2000 WL 33250573 (Utah App.))

Court of Appeals of Utah.

Rae Lyn SCHWARTZ, Plaintiff and Appellant,
v.
David BENZOW, Defendant and Appellee.

No. 990328-CA.

June 29, 2000.

James W. Jensen, Cedar City, and Bruce H. Nagel and Andrew R. Bronsnick, Livingston, NJ, for appellant.

Karra J. Porter, Salt Lake City, for appellee.

Before GREENWOOD, BILLINGS, and ORME, JJ.

MEMORANDUM DECISION (Not for Official Publication)

GREENWOOD.

***1** Rae Lyn Schwartz appeals from a jury verdict finding both parties fifty percent at fault, resulting in a judgment for defendant, David Benzow. Specifically, Schwartz appeals three rulings by the trial court: (1) failure to grant a new trial because of an inconsistent jury verdict, (2) admission of hearsay evidence at trial, and (3) refusal to give a requested jury instruction. We affirm.

Schwartz argues that she is entitled to a new trial because the jury verdict was inconsistent. Schwartz first objected to the inconsistent verdict approximately two months after the jury rendered its verdict, in a motion for a new trial, which the trial court subsequently denied. The "failure to object to a verdict, informal or insufficient on its face, before the jury is discharged, constitutes a waiver of that objection." *Ute-Cal Land Dev. Corp. v. Sather*, 605 P.2d 1240, 1247 (Utah 1980) (citation omitted). "[C]ounsel has the obligation not only to object to the form of the verdict, but to affirmatively seek to examine it." *Martineau v. Anderson*, 636 P.2d 1039, 1043 (Utah 1981). Because Schwartz failed to raise concerns about the inconsistency of the jury verdict until more than two months after the jury was discharged, Schwartz waived any challenge to the jury verdict.

Next, Schwartz argues that admission of hearsay testimony at trial was prejudicial error. We review evidentiary rulings for an abuse of discretion; however, " ' "[a]n erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful." ' " *State v. Jaeger*, 1999 UT 1, ¶ 30, 973 P.2d 404 (alteration in original) (citations omitted). Schwartz objects to the police officer's testimony that one biker told him that she did not recall a jeep passing by at all and that a second biker told him that the jeep was fifteen feet past Schwartz when the crash occurred. However, a third biker, Jeffery Branigan, who was Schwartz's witness, directly testified that he saw the jeep crowd and honk at the bikers but did not see the jeep make contact with Schwartz's bike. Both hearsay statements, admitted through the police officer's testimony, are entirely consistent with the core of Branigan's testimony, namely that he did not see contact between the jeep and Schwartz's bike. Therefore, if the admission of the hearsay statements was error, the error was harmless and not reversible.

Finally, Schwartz claims that it was prejudicial for the trial judge to deny her request for a jury instruction about the illegality of driving across a double yellow line. "We review a judge's refusal to give a jury instruction for correctness, as it is a question of law." *Robinson v. All-Star Delivery, Inc.*, 1999 UT 109, ¶ 9, 992 P.2d 969. Schwartz's failure to notify the court that she wished to submit jury instructions by the court's specified deadline "carries with it the same consequence of failing to submit them at all." *State v. Evans*, 668 P.2d 566, 568 (Utah 1983). A pretrial order specified that the last day to submit jury instructions was October 20, 1998. The jury instruction under appeal was not filed until November 18, 1999. Therefore, by submitting the jury instruction to the court after the deadline, Schwartz waived any challenge to the trial judge's refusal to give the instruction. Furthermore, we fail to see how the instruction would have benefitted Schwartz, since under the circumstances of this case, breaking the law by crossing the double yellow line mitigates against Benzow's negligence in that if he did so, it would only have helped him to avoid the bikers.

***2** Schwartz's objection to the inconsistent jury verdict, as well as her request for the jury instruction were not timely, and therefore, Schwartz waived these issues. Also, if the admission of the hearsay testimony at trial

was error, the error was harmless. Accordingly, we affirm.

BILLINGS and ORME, JJ., concur.

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